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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Before the
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Washington, D.C. 20554

In the Matter of

Review of the Commission's)	
Regulations Governing Attribution)	MM Docket No. 94-150
of Broadcast Interests)	
)	
Review of the Commission's)	
Regulations and Policies Affecting)	MM Docket No. 92-51
Investment in the Broadcast)	
Industry)	
)	
Reexamination of the Commission's)	MM Docket No. 87-154
Cross-Interest Policy)	

To: The Commission

COMMENTS OF NATIONAL BROADCASTING COMPANY, INC.

Summary and Background

National Broadcasting Company, Inc. is pleased to respond to the Commission's Notice of Proposed Rulemaking in this proceeding because the notice raises the same issues that NBC raised in its filings against SF Broadcasting. In fact, NBC withdrew its petitions as a result of the Commission's initiation of this rulemaking proceeding and the separate proceeding on the alien ownership limits of Section 310(b). These proceedings lay the foundation for the FCC to clearly articulate the standards for ownership attribution. NBC believes that these broad and important policy issues are most appropriately decided in the

rulemaking context.¹

A reassessment of the attribution standards is particularly appropriate now, while both Congress and the Commission are considering various options to relax the multiple ownership rules that limit investment in broadcast stations and the cross-ownership rules that restrict cross-investment in different media industries.² Whatever policy decisions are reached regarding the appropriate limits on media investment and ownership, it is those rules that should set the standards for all players. The sole purpose of the attribution rules should be to enforce the ownership rules fairly: the attribution rules should not provide a back door through which the policies that underlie the ownership limits can be evaded.

To encourage investment in the broadcast industry the FCC

¹As the Supreme Court has explained:

Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon ad hoc adjudication to formulate new standards of conduct The function of filling in the interstices of the Act should be performed, as much as possible, through th[e] quasi-legislative promulgation of rules

SEC v. Chenery Corp., 332 U.S. 194, 202 (1947).

²As NBC argues in comments filed today in the ownership proceeding, MM Docket Nos. 91-221 and 87-8, there is no longer a competition or diversity policy basis for the ownership rules and they should be eliminated or significantly relaxed.

has traditionally held that truly passive investments should not count against the ownership limits. If that remains the FCC's position, then in this proceeding it should seek to draw bright, easily discernible lines that ensure that only truly passive interests escape attribution. A key focus of the proceeding should be to define at which point a combination of various interests, none of which would individually result in attribution, together confer sufficient influence to require attribution. As Commissioner Ness has observed in this context, it is possible that in some circumstances, "the whole is greater than the sum of its parts."³ Wherever the multiple ownership limits are drawn, the attribution rules should not permit loopholes and combinations that undermine the policy decisions reflected in the ownership rules.

Discussion

Specifically, NBC believes that the Commission's efforts should conform to the following principles:

- The attribution rules must be clearly written and equally enforced.
- The rights enjoyed by "passive" investors (e.g., nonvoting stockholders and minority interests) must be consistent with

³Separate Statement of Commissioner Susan Ness, BBC License Subsidiary, L.P., FCC 95-179, released April 27, 1995.

non-attribution.

- The Commission should clearly state whether certain structures are consistent with non-attribution. Those include:
 - (1) disproportionate equity investment and risks of ownership by "passive" investors;
 - (2) close past relationships between key licensee personnel and "passive" investors;
 - (3) right of "passive" investors to name or participate in the selection of key employees;
 - (4) right of "passive" investors to impose or participate in the negotiation of licensee management or employment agreements;
 - (5) participation of "passive" investors in the selection of the licensee's governing board and key operating personnel;
 - (6) rights of "passive" investors in new licensees to influence or mandate key operating and programming decisions, such as network affiliation.
- The attribution rules should encourage investment in the broadcast industry.

A. The attribution rules must be precisely written and equally enforced.

The restrictions, if any, on broadcast ownership should be set by the Commission's ownership rules. The attribution rules should not provide a means to evade these restrictions. If, as NBC argues in Comments filed today in the FCC's proceeding to reexamine its ownership rules,⁴ national and local ownership restrictions are no longer necessary to foster competition and diversity, then the solution is elimination or substantial relaxation of those rules. The solution is not imprecise or inconsistently applied attribution standards.

As discussed below, NBC believes that attribution benchmarks can be somewhat relaxed and thus encourage investment without risk of undermining the Commission's multiple ownership and cross ownership rules. However, (1) wherever the lines that indicate attribution are drawn, they should be drawn brightly so that all competitors are on notice; and (2) once the bright lines are drawn they should be enforced equally so that no competitor is given special regulatory advantages. Vaguely drawn rules, or rules that are subject to liberal interpretations and uneven

⁴Comments of National Broadcasting Company, Inc. in MM Dockets No. 91-221 and 97-8, filed May 17, 1995.

enforcement of standards, encourage abuse. They reward competitors that bend, stretch, or even violate the rules at the expense of competitors that comply with their historical understanding.

B. The Attribution Standards Should Articulate the Assumptions that Underlie the Nomenclature

NBC supports the Commission's "single majority shareholder" exception and its existing policy of not attributing nonvoting stock. Both of these policies are effective in promoting investment in the broadcast industry by allowing parties to invest unlimited passive capital.⁵ The "single majority shareholder" exception recognizes that when one stockholder has affirmative control of an enterprise the minority shareholders, even acting together, generally do not have the power to influence day to day operations. Likewise, in the absence of additional rights, the holders of nonvoting stock generally cannot influence a licensee's operations.

However, both exemptions are based on assumptions about the rights and powers conferred by nonvoting stock and minority stock interests. The nonvoting stock exemption assumes that nonvoting

⁵Cf. Attribution of Ownership Interests, 55 RR 2d 1465, 1483 (1984) (recognizing nonvoting stock as an "invaluable means" for raising broadcast investment capital without diluting control).

stock by its very nature does not confer any control rights,⁶ while the single majority shareholder exemption assumes that holders of minority interests, even acting together, cannot appreciably influence the operations of a licensee controlled by a single majority shareholder. The Commission should make clear that these assumptions are the basis of the nonvoting stock and single majority shareholder exemptions. It should also clearly indicate that even if a stockholder is the minority shareholder in a single majority shareholder situation, or owns only "nonvoting" stock, the stockholder's interests will be deemed attributable if it has the ability to significantly influence key operating decisions or personnel of the licensee.

In sum, although NBC believes certain types of passive interests should continue to escape attribution, the Commission should make clear that when those interests are coupled with certain indicia of de facto control or substantial influence they will be deemed attributable.⁷ Whatever lines the Commission draws, the standards should be clearly articulated and should apply to all similar interests.

⁶Id. at 1483 ("...nonvoting stock by its specific nature precludes the means to influence or control the activities of the issuing corporation, and this relationship is knowingly and intentionally entered into by the corporation and the stockholder.")

⁷Rights normally held by passive investors allowing participation in extraordinary corporate actions outside of the normal course of business, standing alone, should not create an attributable interest. See, e.g., National Broadcasting Co., Inc., 69 RR 2d 1099, 1100, n. 2.

- C. The Commission should eliminate the fig leaves and trap doors that have been used to evade the attribution standards either by announcing that they are acceptable or by clearly prohibiting them.

The multiple ownership limits and comparative preferences for certain types of applicant have provided powerful incentives for evasion of the attribution rules. The Notice of Proposed Rulemaking has specifically picked up on a number of the devices that have been used. As NBC has stated on many previous occasions, it is critically important that the Commission state clearly which devices of licensee influence trigger attribution and which do not. NBC urges the Commission to address specifically:

- (1) Whether a party that takes a greatly disproportionate share of the risks of ownership may escape attribution;
- (2) Whether a non-attributable stockholder may participate in the selection of the licensee's chief operating officer or other key personnel;
- (3) The effect of key positions being staffed by those with close and longstanding relationships with a "passive" investor;
- (4) Whether a non-attributable stockholder may participate in the crafting of employment and/or management agreements for key licensee personnel;

- (5) Whether it is consistent with non-attribution for a "passive" investor to (a) be a party to an agreement that establishes the licensee's governing board or (b) otherwise participate in the selection of any board members;
- (6) Whether a network may actively participate in the formation of a new broadcast licensee, require affiliation with the network as a condition of investment, and yet escape attribution of the new licensee's stations.

However the FCC resolves these issues, it should base its decision on a clear and candid assessment of the facts and should clearly state that the same standards will apply to all competitors.

D. The attribution rules should encourage, not inhibit investment.

The broadcast ownership rules and the attribution standards that enforce them are intended to ensure a diversity of broadcast voices by limiting the number of broadcast outlets that one "speaker" may influence or control. However, if the attribution rules are drawn more broadly than necessary, they would also act as indirect limitations on investment in the broadcast industry and may actually curb diversity. As a general matter the

Commission should not limit the flow of passive investment into broadcasting.

Particularly in the next decade, as television stations transition from analog to digital broadcasts, the industry will need enormous inflows of capital. The transition will essentially require that the television infrastructure be rebuilt and that broadcasters bear the expense of operating two television stations simultaneously with no increase in available viewers. The sources of capital to finance this transition, particularly outside of the largest markets or in the case of marginal stations -- may be scarce. It makes little sense to impose unnecessarily restrictive attribution standards -- those that inhibit investment by attributing ownership interests that are not likely to diminish diversity -- on the very investors who are willing to take the risk of financing the transition.⁸

For these reasons, NBC believes that the Commission should continue to allow purely passive capital -- including true nonvoting stock interests, debt, warrants, and options that do not convey control -- to escape attribution. Similarly, the Commission should raise the attribution benchmarks from 5% to 10% for voting stock interests and from 10% to 20% for interests held

⁸At the same time the ATV transition is making enormous demands on the capital markets, the FCC may be trying to stimulate investment in small and certain minority-owned broadcast enterprises. Unnecessarily restrictive attribution standards will frustrate that objective.

by institutional investors. These limits are low enough to minimize the potential for influence over day-to-day operations in the vast majority of cases, yet high enough to reduce the potential for abuse. And they allow for meaningful investment without requiring that the structure of the licensee be driven primarily by concern over the FCC's attribution standards rather than other business considerations.

Respectfully submitted,



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